No. 05-1486

In the Supreme Court of the United States

JUDY RICHARD, EXECUTRIX OF THE ESTATE OF BARBARA RAY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in determining whether a miner suffered from pneumoconiosis for purposes of a claim for benefits under the Black Lung Benefits Act of 1972 (BLBA), 30 U.S.C. 901 *et seq.*, an administrative law judge (ALJ) must consider all relevant evidence, including all of the types of evidence listed in 20 C.F.R. 718.202(a).

2. Whether, in reviewing the decision of an ALJ to grant benefits under the BLBA, the Benefits Review Board may remand where the ALJ failed adequately to consider all relevant evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 142-159)[1] is not published in the *Federal Reporter*, but is reprinted in 160 Fed. Appx. 203.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2005. A petition for rehearing was denied on January 19, 2006 (Pet. App. 160-161). On April 21, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including

[1] All citations of the appendix to the petition refer to volume 1 of that appendix.

May 19, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Coal workers' pneumoconiosis—black lung disease—affects a high percentage of American coal miners with severe, and frequently crippling, chronic respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976). The Black Lung Benefits Act of 1972 (BLBA), 30 U.S.C. 901 *et seq.*, provides benefits "to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901(a). The surviving dependent of a deceased miner may obtain benefits under the BLBA if the survivor can show that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. 718.205(a). A finding of the existence of pneumoconiosis "may be made" based on the following types of evidence: (1) X-ray evidence; (2) biopsy or autopsy evidence; (3) evidence that certain regulatory presumptions apply; and (4) the finding of a physician, based on objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. 718.202(a).[2] Moreover, the BLBA provides that, "[i]n determining the validity of claims * * *, all relevant

[2] A miner's death is due to pneumoconiosis if "any of the following criteria is met": (1) competent medical evidence establishes that pneumoconiosis was the cause of the miner's death; (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death (or complications from pneumoconiosis caused the death); or (3) a particular regulatory presumption applies. 20 C.F.R. 718.205(c).

evidence shall be considered," including X-ray evidence, results from other medical tests, evidence submitted by the miner's physician, and any other supporting materials. 30 U.S.C. 923(b) (2000 & Supp. III 2003).

Disputed claims for benefits are adjudicated in the first instance by administrative law judges (ALJs). See 20 C.F.R. 725.452(a). Those decisions are subject to review by the Department of Labor's Benefits Review Board (Board), see 20 C.F.R. 725.481, which is authorized to set aside an ALJ's findings of fact or conclusions of law "if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law." 20 C.F.R. 802.301(a). The Board's decisions, in turn, are subject to judicial review in the courts of appeals. See 30 U.S.C. 932(a) (incorporating 33 U.S.C. 921(c)); 20 C.F.R. 725.482(a).

2. Ralph E. Ray, Sr., worked in various coal mines from 1973 to 1987. During and after that period, Ray smoked about two packs of cigarettes per day. In 1987, Ray filed a claim for miner's benefits, which was denied. Ray died on April 18, 1996. Petitioner subsequently filed a claim for survivor's benefits on behalf of Ray's disabled dependent child. Pet. App. 24, 106, 144.[3]

The ALJ held a hearing at which he received various medical evidence, including the opinions of three physicians; medical studies; X-ray evidence; the results of a computed tomography (CT) scan; and the earlier opinions of seven physicians from Ray's unsuccessful 1987 claim. See Pet. App. 24-40. The ALJ then awarded survivor's benefits. *Id.* at 41-56. The ALJ recognized that the X-ray evidence was conflicting and, "[s]tanding

[3] The child has since died, and petitioner now pursues the claim on behalf of the child's estate. See Pet. 6.

alone," did not establish the existence of pneumoconiosis. *Id.* at 46. The ALJ also conceded that the weight of medical opinion from Ray's 1987 claim showed that pneumoconiosis "was not established at the time." *Id.* at 48. In concluding that Ray nevertheless suffered from pneumoconiosis, the ALJ relied primarily on the opinion of Dr. Michael Wald, who concluded that, although Ray did not suffer from clinical pneumoconiosis, Ray suffered from chronic obstructive pulmonary disease that was aggravated by his exposure to coal dust, with the result that he suffered from legal pneumoconiosis for purposes of the BLBA. *Id.* at 49; cf. 20 C.F.R. 718.201(a) (defining "clinical" and "legal" pneumoconiosis).[4] The ALJ discounted the opinion of another physician, Dr. John Scott, who concluded that Ray's pulmonary disease was not aggravated by exposure to coal dust. Pet. App. 49.[5] The ALJ also asserted, notwithstanding his earlier recognition that the X-ray evidence was conflicting, that "[t]he x-ray findings clearly corroborate" the conclusion that Ray suffered from pneumoconiosis. *Ibid.* The ALJ proceeded to conclude that Ray's pneumoconiosis arose out of his coal mine employment, *id.* at 50-51, and that his death was due to pneumoconiosis, *id.* at 51-54.

3. The Board vacated the ALJ's award and remanded. Pet. App. 62-70. At the outset, the Board

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[4] "Legal" pneumoconiosis is broader than "clinical" pneumoconiosis, insofar as it includes "diseases whose etiology is not inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure." *Clinchfield Coal Co.* v. *Fuller*, 180 F.3d 622, 625 (4th Cir. 1999).

[5] The third physician, Dr. Robert Sinnenberg, concluded that, while Ray probably suffered from pneumoconiosis, it was too slight to have hastened or contributed to his death. Pet. App. 53.

noted that the ALJ's decision "must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law." *Id.* at 64. The Board then explained that, "[a]lthough Section 718.202(a) provides four distinct methods of establishing pneumoconiosis, 'all types of relevant evidence must be weighed together to determine whether the [miner] suffer[ed] from the disease.'" *Id.* at 65 (some brackets in original) (quoting *Penn Allegheny Coal Co.* v. *Williams*, 114 F.3d 22, 25 (3d Cir. 1997)). The Board concluded that the ALJ "failed to weigh together all of the evidence relevant to the existence of pneumoconiosis" because (1) he did not explain how the X-ray evidence corroborated his conclusion that Ray suffered from pneumoconiosis and (2) he failed to indicate how much weight, if any, he accorded to the results of the CT scan, which was negative for pneumoconiosis. *Id.* at 68-69. The Board also noted that the ALJ appeared to have been operating on a misunderstanding of Dr. Wald's credentials. *Id.* at 70. The Board accordingly vacated for "further consideration of the relevant evidence under Section 718.202(a)" concerning the existence of pneumoconiosis. *Id.* at 69.

4. On remand, the ALJ again awarded benefits. Pet. App. 71-80. The ALJ explained that "[m]y earlier comment concerning the corroboration by x-ray evidence inartfully referred to the fact that [chronic obstructive pulmonary disease] had been established by x-ray evidence, thus corroborating the existence of [pulmonary disease] caused in part by coal mine dust exposure." *Id.* at 75. As to the existence of pneumoconiosis, the ALJ reiterated that he had discounted Dr. Scott's opinion and had credited Dr. Wald's opinion as "convincing[]." *Ibid.* The ALJ also reiterated his conclusion

that Ray's death was due to pneumoconiosis. *Id.* at 76-78.

5. The Board again vacated the ALJ's award and remanded. Pet. App. 81-93. The Board reasoned that the ALJ had failed to "follow the board's previous remand instructions and indicate how much weight he accorded the negative CT scan readings." *Id.* at 88. The Board added that "[s]uch a discussion is critical in this case since a majority of the x-ray evidence, as well as some of the medical reports, are also negative for the existence of pneumoconiosis." *Ibid.* The Board also determined that the ALJ had committed other errors on remand, such as concluding that a diagnosis of cor pulmonale (a cardiovascular disease) was necessarily an indicator of pneumoconiosis; crediting medical opinions from Ray's unsuccessful 1987 claim (and the opinion of Ray's treating physician), notwithstanding the ALJ's earlier finding that those opinions were entitled to lesser weight; and relying on a medical treatise that was not part of the record. *Id.* at 88-91.

6. On further remand, the ALJ denied benefits. Pet. App. 94-127. The ALJ reconsidered the evidence in some detail to determine "whether the miner's severe chronic obstructive lung disease, which caused significant impairment and led to his death[,] is attributable to his smoking, or the combined effects of smoking and coal mine dust exposure." *Id.* at 105. After reconsidering the evidence, the ALJ decided to credit the opinion of Dr. Scott, who believed that Ray did not suffer from pneumoconiosis, over the opinion of Dr. Wald, who believed that he did. *Id.* at 116-123. "Upon further review," the ALJ noted, "Dr. Wald's opinion is contrary to the preponderance of the more credible medical evidence" and "is also somewhat ambiguous and conflict-

ing." *Id.* at 118-119. By contrast, the ALJ stated that Dr. Scott's opinion was "well-reasoned and documented," *id.* at 122, and added that Dr. Scott was more qualified than Dr. Wald, *id.* at 124-125.[6] In light of Dr. Scott's opinion, and the fact that "the x-ray evidence and CT scan [were] overwhelmingly negative for clinical pneumoconiosis," *id.* at 125, the ALJ concluded that petitioner had failed to meet her burden of establishing the existence of pneumoconiosis under Section 718.202(a). *Id.* at 126.

7. The Board affirmed. Pet. App. 128-141. The Board reasoned that, because it had vacated the ALJ's previous awards, the ALJ "was not bound by his prior credibility determinations when he reconsidered the medical evidence on remand." *Id.* at 132. As to Dr. Wald, the Board determined that the ALJ "properly found that the opinions of the other physicians were better reasoned and rendered by physicians with greater pulmonary expertise." *Id.* at 135 (internal quotation marks omitted). The Board concluded that the ALJ's finding on the existence of pneumoconiosis "is rational, contains no reversible error, and is supported by substantial evidence." *Id.* at 140.[7]

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[6] The ALJ accorded little weight to the opinion of the third physician, Dr. Sinnenberg, reasoning that he was "equivocal" regarding the existence of pneumoconiosis. Pet. App. 121. Moreover, the ALJ noted that, to the extent that Dr. Sinnenberg suggested any pneumoconiosis did not hasten or contribute to Ray's death, his opinion was actually more consistent with Dr. Scott's than Dr. Wald's. *Id.* at 121-122.

[7] The Board also determined that petitioner had waived her claim that the Board had previously erred by concluding that the ALJ's failure to state what weight he assigned to particular pieces of evidence was tantamount to a failure to consider that evidence at all. Pet. App. 141 n.4.

8. In an unpublished opinion, the court of appeals denied petitioner's petition for review. Pet. App. 142-159. At the outset, the court noted that it "review[ed] the ALJ's decision to determine whether it was supported by substantial evidence." *Id.* at 153. Applying that standard, the court upheld the ALJ's decision to credit the opinion of Dr. Scott over that of Dr. Wald. *Id.* at 154-158. The court reasoned that "ALJs may grant greater weight to the opinions of physicians who have superior credentials to resolve conflicting medical opinions." *Id.* at 155. The court also rejected petitioner's contention that the Board previously erred by remanding the case to the ALJ to explain the weight of the CT scan evidence. *Id.* at 158-159. Citing its earlier decision in *Penn Allegheny*, *supra*, the court reasoned that all types of relevant evidence must be weighed together to determine whether a miner suffered from pneumoconiosis. *Id.* at 158. The court concluded that "[t]he Board's decision to remand the case to the ALJ to determine what weight (if any) he accorded to CT scan evidence that was negative for the disease was within the mandate of *Penn Allegheny*." *Id.* at 159.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 11-30) that the court of appeals misconstrued 20 C.F.R. 718.202(a), the regulation specifying the means by which a claimant under the Black Lung Benefits Act may establish the existence of pneumoconiosis. In particular, petitioner contends that the court of appeals erred by requiring that all of the

types of evidence listed in Section 718.202(a) be "weigh[ed] together" in determining the existence of pneumoconiosis. Pet. 26-27. Petitioner thereby suggests that a claimant may establish the existence of pneumoconiosis by presenting evidence from only one of the categories listed in Section 718.202(a), even if other evidence is overwhelmingly to the contrary.

Petitioner's contention lacks merit. Section 718.202(a) specifies that a finding of the existence of pneumoconiosis "may be made" based on the following types of evidence: (1) X-ray evidence; (2) biopsy or autopsy evidence; (3) evidence that certain regulatory presumptions apply; and (4) the finding of a physician, based on objective medical evidence and supported by a reasoned medical opinion. The natural reading of that regulation is that, in order to establish the existence of pneumoconiosis, it is sufficient for a claimant to present evidence from one of the specified categories. It does not follow, however, that, when the employer presents contrary evidence (*e.g.*, evidence from another specified category), that evidence must be disregarded, rather than considered together with the claimant's evidence. Such a reading would put Section 718.202(a) in conflict with the BLBA itself, which provides that, "[i]n determining the validity of claims * * *, all relevant evidence shall be considered," including X-ray evidence, results from other medical tests, evidence submitted by the miner's physician, and any other supporting materials. 30 U.S.C. 923(b) (2000 & Supp. III 2003).

Accordingly, the courts of appeals that have addressed the issue have uniformly rejected the construction proposed by petitioner and instead construed Section 718.202(a) as requiring all relevant evidence to be taken into account in determining the existence of pneu-

moconiosis. Thus, the Fourth Circuit has held, based on the "plain meaning" of 30 U.S.C. 923(b), that "all relevant evidence is to be considered together rather than merely within discrete subsections of § 718.202(a)." *Island Creek Coal Co.* v. *Compton*, 211 F.3d 203, 208 (2000); accord *Consolidation Coal Co.* v. *Held*, 314 F.3d 184, 186-187 (4th Cir. 2002). In *Island Creek*, the Fourth Circuit noted that "there is nothing in the language of § 718.202(a) to support a conclusion that satisfaction of the requirements of one of the subsections conclusively proves the existence of pneumoconiosis even in the face of conflicting evidence." 211 F.3d at 209. Instead, the court explained, "weighing all of the relevant evidence together makes common sense," because, "[o]therwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding": for example, if X-ray evidence suggested that a miner had pneumoconiosis, but autopsy evidence definitively established that the miner did not. *Ibid.* The court therefore "read § 718.202(a) as giving claimants flexibility in proving their claims, but not as establishing mutually exclusive bases for demonstrating the existence of pneumoconiosis." *Id.* at 210.[8]

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[8] In *Island Creek*, the Director of the Office of Workers' Compensation Programs also argued that, while "all evidence of medical or clinical pneumoconiosis should be weighed together[] and all evidence of legal or statutory pneumoconiosis should be weighed together," "evidence of the former should not be weighed with evidence of the latter." 211 F.3d at 210. The court of appeals ultimately rejected that additional argument, *id.* at 211, though it recognized as "well-taken" the point that "[e]vidence that does not establish medical pneumoconiosis * * * should not necessarily be treated as evidence weighing *against* a finding of legal pneumoconiosis," *ibid.*

Similarly, in the decision followed by the court of appeals and the Board in the decisions below, the Third Circuit "agree[d] with the Director [of the Office of Workers' Compensation Programs] that[,] although section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." *Penn Allegheny*, 114 F.3d at 25 (internal quotation marks omitted). Like the Fourth Circuit in *Island Creek*, the Third Circuit relied on the provision of the BLBA requiring consideration of "all relevant evidence." See *ibid.* (citing 30 U.S.C. 923(b)). Petitioner identifies no decision adopting a different construction of Section 718.202(a) from that adopted by the Third and Fourth Circuits.[9]

Moreover, even assuming that petitioner could show that Section 718.202(a) were ambiguous, the Director's interpretation of that regulation is reasonable and therefore would be entitled to deference. See, *e.g.*, *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696-697 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987); see generally *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (an agency's interpretation of its own regulation is entitled to substantial deference "unless it is plainly erroneous or inconsistent with the regulation"). Deference to the Director's interpretation is especially appropriate when, as here, that interpretation is longstanding and consistent.

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[9] Courts of appeals have similarly construed 30 U.S.C. 921(c), a statutory provision specifying various means of establishing that a miner suffers from "complicated" pneumoconiosis, as requiring all relevant evidence to be considered. See *Gray* v. *SLC Coal Co.*, 176 F.3d 382, 388-389 (6th Cir. 1999); *Lester* v. *Director, OWCP*, 993 F.2d 1143, 1145-1146 (4th Cir. 1993).

See, *e.g.*, *Penn Allegheny*, 114 F.3d at 25 (quoting Director's brief for proposition that "all types of relevant evidence must be weighed together" under Section 718.202(a)).[10] Because the Director's construction of Section 718.202(a) is valid, and because petitioner cites no conflicting authority, further review on that issue is unwarranted.

2. Petitioner further contends (Pet. 11-30) that the Benefits Review Board exceeded the scope of its authority by remanding to the ALJ on the ground that the ALJ failed adequately to consider all of the relevant evidence. That contention also lacks merit.

As a preliminary matter, petitioner contends that the Board erroneously applied a "more demanding" standard of review than the substantial-evidence standard typically used in review of administrative decisions. Pet. 22; see Pet. 28 (stating that the Board was exercising "*de novo* review powers"). According to petitioner, the court of appeals' ultimate decision therefore conflicts with decisions of the Sixth and Seventh Circuits applying the substantial-evidence standard. Pet. 10-11. In this case, however, both the court of appeals and the Board made clear that they were applying the substantial-evidence standard mandated by the BLBA. See, *e.g.*, Pet. App. 153 (court of appeals decision); *id.* at 64 (Board's first decision); *id.* at 84 (Board's second decision); *id.* at 140 (Board's third decision). Petitioner

[10] Petitioner suggests (Pet. 24) that the Director's silence on the issue in the 2000 BLBA rulemaking indicates that he has not in fact embraced the construction that he had previously advanced before the Third Circuit in *Penn Allegheny*. That silence, however, is more plausibly read as reflecting the Director's belief that, in light of the Third Circuit's decision in *Penn Allegheny*, further rulemaking on the issue was simply unnecessary.

therefore identifies no conflict that merits this Court's review.

In any event—and contrary to petitioner's suggestion (Pet. 11)—the Board did not vacate the ALJ's award on the ground that the evidence on which the ALJ relied in determining that Ray suffered from pneumoconiosis was insufficient. Instead, the Board did so primarily on the ground that the ALJ "failed to weigh together all of the evidence relevant to the existence of pneumoconiosis": specifically, (1) by failing to explain how the X-ray evidence supported his determination, and (2) by failing to indicate how much weight, if any, he accorded to the results of the CT scan. Pet. App. 68-69 (Board's first decision); *id.* at 88 (Board's second decision). Even in the circuits cited by petitioner, it is well established that, in reviewing an ALJ's decision to award benefits under the BLBA, the Board (or a reviewing court) may remand when the ALJ "failed to analyze all of the relevant evidence" or "failed to adequately explain his reasons for crediting certain evidence and discrediting other evidence." *Milburn Colliery Co.* v. *Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); see, *e.g.*, *Martin* v. *Ligon Preparation Co.*, 400 F.3d 302, 307 (6th Cir. 2005) (brackets in original) (remanding where the ALJ credited one doctor's opinion over another's despite the ALJ's determination that the former opinion "contain-[ed] little rationale or explanation," whereas the latter opinion was "well-reasoned"); *Consolidation Coal Co.* v. *OWCP*, 54 F.3d 434, 437 (7th Cir. 1995) (remanding for ALJ to "explain or abandon his conclusion" that the opinion of the treating physician was entitled to greater weight than those of two other physicians). A remand in such circumstances is appropriate to ensure that the ALJ complies with the BLBA's requirement that he con-

sider "all relevant evidence" in assessing the validity of a claim for benefits. 30 U.S.C. 923(b) (2000 & Supp. III 2003); cf. 20 C.F.R. 725.477(b) (requiring ALJ to provide "a statement of the basis of the order").

Petitioner contends (Pet. 23) that the Board adopted a rule that treats "an ALJ's failure to discuss *any* item of evidence as reversible error" (emphasis added). In this case, however, the Board adopted no such rule, but instead merely applied the established rule that the failure adequately to analyze a relevant or probative piece of evidence may warrant a remand. With regard to the results of the CT scan, the Board explained that "a discussion [of the results] is critical in this case since a majority of the x-ray evidence, as well as some of the medical reports, are also negative for the existence of pneumoconiosis." Pet. App. 88. The Board did not attempt to reweigh the evidence itself, but instead left that task to the ALJ on remand—and the ALJ, after reweighing the evidence (and reevaluating the opinions of the testifying physicians), concluded that petitioner had not shown the existence of pneumoconiosis. Petitioner cites no authority for the proposition that the Board (or a reviewing court) lacks the power to remand when the ALJ fails adequately to analyze a piece of evidence, even when that analysis is viewed as "critical."

Finally, petitioner implies (Pet. 18-20) that the standard for review applied by the Board conflicts with the standard for review of agency decisions more generally under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq*. Hearings under the BLBA are governed by the APA, see 30 U.S.C. 932(a) (incorporating 33 U.S.C. 919(d)); 20 C.F.R. 725.452(a), and the APA, consistent with the BLBA itself, permits a reviewing court to set aside an agency's factual findings when those findings

are not supported by substantial evidence, see 5 U.S.C. 706(2)(E). Even outside the BLBA context, it is a settled principle of administrative law that a reviewing court may remand when an ALJ does not adequately consider evidence pertinent to a claim for benefits. See, *e.g.*, *Godbey* v. *Apfel*, 238 F.3d 803, 807 (7th Cir. 2000) (benefits under Social Security Act, 42 U.S.C. 301 *et seq.*); cf. 5 U.S.C. 556(d) (requiring ALJ to "consider[] * * * the whole record or those parts thereof cited by a party" before issuing an order). No principle of administrative law forbids the Board (or a reviewing court) to remand in such circumstances, so as to allow the ALJ either to explain why the evidence did not alter the outcome or (as here) to consider the evidence and reach a different conclusion.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2006

[11] Petitioner notes (Pet. 19) that, under 5 U.S.C. 556(d), an ALJ has the authority to exclude "irrelevant, immaterial, or unduly repetitious evidence." In this case, however, there is no reason to believe that the ALJ excluded the evidence at issue on that ground.